IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1973

No. 73-476

SEYMOUR GROSS, PETITIONER

v.

MEDICAL MUTUAL OF CLEVELAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONER

The four decisions of this Court cited by Respondent are not inconsistent with the Petitioner's position. In each of those cases the trial court had assumed jurisdiction and litigated the issues on the merits.

This Court stated the rule in Durfee v. Duke,

375 U.S. 106, 114:

> "...After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined...." (Underscoring supplied)

In the instant case the trial court in the first suit did not assume jurisdiction and the Petitioner did not have his day in court, with an opportunity to present his evidence and his view of the law.

Where the district court specifies in an order of dismissal the grounds thereof which do not involve the merits of the case, but rather the failure of a jurisdictional requirement, the dismissal does not operate as a dismissal on the merits and is not a bar to a subsequent suit after determination that the court has jurisdiction.

Madden v. Perry, 264 F. 2d 169 (C.A. 7), certiorari denied, 355 U.S. 831

U.S. v. Rand, 53 F. 348 (C.A. 1)

A dismissal for "lack of jurisdiction" is not res judicata.

Bell v. Hood, 327 U.S. 678

Costello v. United States, 365 U.S. 265

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Seymour Gross

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PROOF OF SERVICE

I, Seymour Gross, counsel for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of November, 1973, I served five (5) copies of the foregoing Reply Memorandum of Petitioner upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing the same, in a duly addressed envelope, with first class postage prepaid.

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